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Samsiah bt Leman v Ketua Polis Negara & Ors

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HIGH COURT (PULAU PINANG) — APPLICATION FOR JUDICIAL
REVIEW NO 25–106–09 OF 2014
COLLIN SEQUERAH JC
23 SEPTEMBER 2015

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*Civil Procedure — Judicial review — Application for — Application for
judicial review against decision of Police Disciplinary Board — Allegation that
respondents named in application were not decision maker of impugned decision
— Dismissal from police force — Whether application brought against wrong
party — Rules of Court 2012, O 53 r 1*

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Two applications arose before the court. Enclosure (1) was an ex parte application by the applicant for leave to file judicial review under O 53 r 3(1) of the Rules of Court 2012 ('the ROC'). The application for leave was made pursuant to a decision by the Police Disciplinary Board and communicated to the applicant via letter ('the said letter'). The impugned decision resulted in the dismissal of the applicant from the police force. The attorney general's chambers ('the AGC') raised a preliminary objection to the leave application. By way of encl (10), the applicant sought to amend their statement under O 53 r 3(2) of the ROC filed in the application for judicial review to substitute a new party as a respondent, namely, the Police Disciplinary Board, in place of the named respondents. The AGC raised an objection to the application for leave to file judicial review by the applicant on the ground that the application was brought against the wrong party as all the respondents named in the application were not the decision maker of the impugned decision communicated by way of the said letter. It was submitted that the decision maker was the Police Disciplinary Board (*Lembaga Tatatertib*). The respondents submitted that the applicant must correctly identify the party responsible for the decision in the exercise of the public duty or function which had adversely affected her ie the public authority.

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Held, dismissing the applications with costs:

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- (1) The capacity of the first respondent as Inspector General of Police ('IGP') was separate and distinct from the post he held as chairman of the disciplinary board. The IGP derived his powers from the Police Act 1967. By way of contrast, in exercising his power as chairman of the disciplinary board, he was regulated by the Public Officers (Conduct and Discipline) Regulations 1993. The capacity in which he had acted in issuing the said letter clearly reflected that he was performing the function of Chairman

of the Disciplinary Board. Further, the decision to dismiss that was communicated to the applicant by way of the said letter clearly contained references which indicated that the decision was that of the Disciplinary Board 'Lembaga Tatatertib' (see para 8).

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- (2) The applicant was a member of the police force. As a member of the force, art 140(1) of the Federal Constitution would apply to her. The power of the Police Force Commission under the said art 140 had been delegated to the disciplinary board by virtue of art 140(6)(b) of the Federal Constitution. The proper party therefore was the disciplinary board. The first to the fourth respondents were not the decision making bodies that decided against the applicant and should not have been named in the application. The AGC's preliminary objection was upheld (see paras 9–11).

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- (3) The three months time frame imposed by O 53 r 3(6) of the ROC for bringing an application for leave to file judicial review could not be treated as mere pedantry or surplus of wording. It goes to the jurisdiction of the court itself. Notwithstanding that, the court has the general power to extend or abridge the time limit under O 53 r 3(6) if there were good reasons to do so. However, there must be good and satisfactory grounds laid before the court before it could exercise its discretion. Unfortunately here, there was in fact no application made for the court to exercise its discretion to extend or abridge the time. Enclosure 10 did not allude to any reasons or any cogent reasons to explain the delay in filing the application (see para 22).

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- (4) Allowing the applicant to add a party at a stage when limitation had expired would also be prejudicial to the decision making body which in this case is the disciplinary board as it would have the effect of depriving it from relying on a defence that it would otherwise have been entitled to. The fact that the proper party which was the disciplinary board, had not been made a party within the time allowed by the provisions of O 53 r 3(6) of the ROC and the dismissal of the application to amend to include the proper party results in this court not being seized with jurisdiction to hear the leave application for judicial review (see paras 23 & 27).

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[Bahasa Malaysia summary]

Dua permohonan timbul di hadapan mahkamah. Lampiran (1) adalah permohonan ex parte oleh pemohon untuk kebenaran memfailkan semakan kehakiman di bawah A 53 k 3(1) Kaedah-Kaedah Mahkamah 2012 ('KKM'). Permohonan untuk kebenaran telah dibuat berikutan keputusan oleh Lembaga Tatatertib Polis dan dimaklumkan kepada pemohon melalui surat ('surat tersebut'). Keputusan yang dipersoalkan mengakibatkan pemecatan pemohon daripada pasukan polis. Jabatan Peguam Negara ('JPN') telah

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- A menimbulkan bantahan awal terhadap permohonan kebenaran itu. Melalui lampiran (10), pemohon memohon untuk meminda kenyataan mereka di bawah A 53 k 3(2) KKM yang difailkan dalam permohonan untuk semakan kehakiman bagi menggantikan pihak baru sebagai responden, iaitu Lembaga Tatatertib Polis, dengan responden-responden yang dinamakan. JPN telah
- B menimbulkan bantahan terhadap permohonan untuk kebenaran bagi memfailkan semakan kehakiman oleh pemohon atas alasan bahawa permohonan itu dimulakan terhadap pihak yang salah kerana kesemua responden yang dinamakan dalam permohonan itu bukan pembuat keputusan keputusan yang dipersoalkan yang telah dimaklumkan melalui surat tersebut.
- C Adalah dihujahkan bahawa pembuat keputusan adalah Lembaga Tatatertib Polis. Responden-responden berhujah bahawa pemohon hendaklah dengan betul mengenal pasti pihak yang bertanggungjawab untuk keputusan itu bagi melaksanakan kewajipan atau fungsi awam yang telah menjejaskannya secara bertentangan iaitu pihak berkuasa awam.
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Diputuskan, menolak permohonan-permohonan dengan kos:

- E (1) Kapasiti responden pertama sebagai Ketua Inspektor Polis ('KIP') adalah berasingan dan berbeza daripada jawatan yang dipegangnya sebagai pengerusi lembaga tatatertib. KIP memperoleh kuasa beliau daripada Akta Polis 1967. Secara perbandingan, dalam melaksanakan kuasanya sebagai pengerusi lembaga tatatertib, dia dikawal oleh Peraturan-Peraturan (Kelakuan dan Tatatertib) Penjawat-Penjawat Awam 1993. Kapasiti yang mana dia bertindak dalam mengeluarkan surat tersebut jelas menunjukkan bahawa dia melaksanakan fungsi
- F pengerusi lembaga tatatertib. Selanjutnya, keputusan untuk memecat yang dimaklumkan kepada pemohon melalui surat tersebut jelas mengandungi rujukan yang menunjukkan bahawa keputusan itu adalah keputusan lembaga tatatertib (lihat perenggan 8).
- G (2) Pemohon ialah ahli pasukan polis. Sebagai ahli pasukan, perkara 140(1) Perlembagaan Persekutuan terpakai ke atasnya. Kuasa Suruhanjaya Pasukan Polis di bawah perkara 140 tersebut telah diwakilkan kepada lembaga tatatertib menurut perkara 140(6)(b) Perlembagaan Persekutuan. Pihak sewajarnya adalah lembaga tatatertib.
- H Responden-responden pertama hingga keempat bukan badan-badan membuat keputusan yang diputuskan terhadap pemohon dan tidak patut dinamakan dalam permohonan itu, bantahan awal JPN dikekalkan (lihat perenggan 9–11).
- I (3) Jangka masa tiga bulan yang dikenakan oleh A 53 k 3(6) KKM bagi memulakan permohonan untuk kebenaran bagi memfailkan semakan kehakiman tidak boleh dianggap sebagai berunsur menunjuk-nunjuk atau perkataan yang banyak. Ia berasaskan bidang kuasa mahkamah itu sendiri. Walaupun begitu, mahkamah mempunyai kuasa am untuk

melanjutkan atau menyambung had masa di bawah A 53 k 3(6) jika terdapat alasan baik untuk berbuat demikian. Walau bagaimanapun, perlu ada alasan yang baik dan memuaskan dikemukakan di hadapan mahkamah sebelum ia boleh melaksanakan budi bicaranya. Namun begitu, pada hakikatnya tiada permohonan dibuat untuk mahkamah melaksanakan budi bicaranya bagi melanjutkan atau menyambung masa. Lampiran 10 secara tidak langsung menyebut apa-apa sebab atau apa-apa alasan yang meyakinkan untuk menjelaskan kelewatan memfailkan permohonan itu (lihat perenggan 22).

- (4) Dengan membenarkan pemohon menambah satu pihak di peringkat di mana had masa telah luput adalah bersifat prejudis terhadap badan membuat keputusan yang mana dalam kes ini adalah lembaga tatatertib kerana ia akan mempunyai kesan menafikannya daripada bergantung kepada pembelaan yang ia sebaliknya mempunyai hak terhadapnya. Fakta bahawa pihak sewajarnya iaitu lembaga tatatertib, tidak menjadi pihak dalam tempoh masa yang dibenarkan oleh peruntukan A 53 k 3(6) KMM dan penolakan permohonan untuk meminda bagi memasukkan pihak sewajarnya telah mengakibatkan mahkamah ini tidak diberikan bidang kuasa untuk mendengar kebenaran permohonan bagi semakan kehakiman (lihat perenggan 23 & 27).]

Notes

For cases on application for judicial review, see 2(3) *Mallal's Digest* (5th Ed, 2015) paras 5575–5579.

Cases referred to

- Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145, FC (refd)
- Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228, SC (folld)
- Boey Oi Leng (t/a Indah Reka Construction & Trading) v Trans Resources Corp Sdn Bhd* [2001] MLJU 566; [2002] 1 CLJ 405, HC (refd)
- Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409, SC (not folld)
- Ketteman v Hansel Properties* [1987] 2 WLR 312, HL (refd)
- Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2009] 6 MLJ 307; [2009] 6 CLJ 405, FC (refd)
- Menteri Besar Negeri Pahang Darul Makmur v Seruan Gemilang Makmur Sdn Bhd* [2010] 4 MLJ 360, CA (refd)
- Mohd Ismail bin Abd Ghani (would like to be known in the identity card as Saravanan a/l Balakrishnan) v Ketua Pengarah Pendaftaran Negara & Anor* [2012] 1 MLJ 707, HC (refd)
- SDB Damansara Sdn Bhd v Datuk Bandar Kuala Lumpur (No 1)* [2011] 9 MLJ 666, HC (refd)

A Legislation referred to

Federal Constitution arts 140, 140(1), (6)(b)

Police Act 1967

Public Officers (Conduct And Discipline) Regulations 1993 s 3

Rules of Court 2012 O 20 r 5, O 53, O 53 rr 2(4), 3(1), (2), (6), (7)

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Rules of the High Court 1980 O 15 r 6(2)(b), O 53 rr 3(6), 8(1)

RSN Rayer (R Nethaji Rayer & Co) for the applicant.

Kogilambigai a/p Muthusamy (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

C**Collin Sequerah JC:****INTRODUCTION****D**

[1] There are two applications before the court. Enclosure (1) is an ex parte application by the applicant for leave to file judicial review under O 53 r 3(1) of the Rules of Court 2012 ('the ROC 2012'). The application for leave is made pursuant to a decision by the Police Disciplinary Board and communicated to the applicant via letter dated 26 May 2014 and received by her on 12 June 2014. The impugned decision resulted in the dismissal of the applicant from the police force. The Attorney General's Chambers ('AG's Chambers') are however, raising a preliminary objection to the leave application.

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[2] By way of encl (10), the applicant seeks to amend their statement under O 53 r 3(2) of the Rules of Court 2012 filed in the application for judicial review to substitute a new party as a respondent, namely, the Police Disciplinary Board, in place of the named respondents. The objection raised by the AG's Chambers to the application for leave and the applicant's application to amend will be dealt with in turn.

G**PRELIMINARY OBJECTION BY THE ATTORNEY GENERAL'S CHAMBERS TO APPLICATION FOR LEAVE TO FILE JUDICIAL REVIEW****H**

[3] The AG's Chambers represented by the learned federal counsel ('FC'), has raised an objection to the application for leave to file judicial review by the applicant. The reason for their objection is that they contend that the application is brought against the wrong party as all the respondents named in the application were not the decision maker of the impugned decision communicated by way of letter dated 26 May 2014. The decision maker, they submit, is the Police Disciplinary Board (*lembaga tata tertib*).

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[4] The respondents rely upon O 53 r 2(4) of the ROC 2012 which reads

as follows:

Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

[5] Based upon the said O 53 r 2(4) of the ROC 2012, the respondents submit that the applicant must correctly identify the party responsible for the decision in the exercise of the public duty or function which had adversely affected her ie the public authority. The respondents submit that pursuant to Legislative Supplement 'B', and more specifically, the Instrument of Delegation of Certain Functions, Powers, Duties and Responsibilities (PU(B) 441/2000), the exercise of public duty or function by the Police Force Commission have been delegated to the disciplinary board as evidenced in the said letter dated 26 May 2014.

[6] They further place reliance on s 3 of the Public Officers (Conduct And Discipline) Regulations 1993 which provides as follows:

'Disciplinary Authority' means the appropriate Service Commission whose jurisdiction extends to the service of which the said officer is a member in accordance with the provisions of Part X of the Federal Constitution, and includes an officer or a board of officers in the public service by whom the Commission's function relating to the disciplinary control is exercisable in pursuance of Clause (5A), (5B), (6) or (6A) of Article 144 of the Federal Constitution.

[7] Therefore, the respondents contend that the decision maker with respect to the impugned decision is the disciplinary board.

[8] I agree with the submission advanced by the learned FC that the capacity of the first respondent as Inspector General of Police ('IGP') is separate and distinct from the post he holds as chairman of the disciplinary board. The IGP derives his powers from the Police Act 1967. By way of contrast, in exercising his power as chairman of the disciplinary board, he is regulated by the Public Officers (Conduct and Discipline) Regulations 1993. The capacity in which he had acted in issuing the show cause letter to the applicant dated 22 April 2013 (exh 'SL3'), clearly reflected that he was performing the function of chairman of the disciplinary board. Further, the decision to dismiss that was communicated to the applicant by way of letter dated 26 May 2014 (exh 'SL5'), clearly contained references which indicated that the decision was that of the disciplinary board 'Lembaga Tatatertib'. For example, 'Lembaga Tatatertib setelah menimbangankan representasi anda dengan teliti dan saksama memutuskan ...' and 'Lembaga Tatatertib memutuskan hukuman tatatertib terhadap anda seperti di atas berkuatkuasa mulai 22/5/2014 iaitu tarikh hukuman dijatuhkan'. It is thus patently clear on the face of it that the decision maker was in fact the disciplinary board. This being the case, it cannot be argued that the applicant was misled or confused in any way as to who was the

A decision maker who made the decision against her.

[9] It is not in dispute that the applicant is a member of the police force. As a member of the force, art 140(1) of the Federal Constitution would apply to her. Article 140(1) of the Federal Constitution reads:

B (1) There shall be a Police Force Commission whose jurisdiction shall extend to all persons who are members of the police force and which, subject to the provisions of any existing law, shall be responsible for the appointment, confirmation, emplacement on the permanent or pensionable establishment, promotion, transfer and exercise of disciplinary control over members of the police force:

C Provided that Parliament may by law provide for the exercise of such disciplinary control over all or any of the members of the police force in such manner and by such authority as may be provided in that law, and in that event, if the authority is other than the Commission, the disciplinary control exercisable by such authority shall not be exercised by the Commission; and no provision of such law shall be invalid on the ground of inconsistency with any provision of this Part.

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Article 140(6)(b) reads:

E (6) The Police Force Commission may provide for all or any of the following matters:

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(b) the duties and responsibilities of the several members of the Commission, including the delegation to any member of the Commission or the police force or board of officers of such force or a committee consisting of members of the Commission and of the force of its powers or duties.

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[10] The power of the Police Force Commission under the said art 140 has been delegated to the disciplinary board by virtue of art 140(6)(b) of the Federal Constitution vide PU(B) 441/2000. The proper party therefore is the disciplinary board.

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[11] In the premises I find that the first to the fourth respondents were not the decision making bodies that decided against the applicant and should not have been named in the application. I therefore uphold the AG's Chambers preliminary objection.

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THE APPLICANT'S APPLICATION TO AMEND STATEMENT
UNDER O 53 R 3(2) OF THE RULES OF COURT 2012

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[12] When the hearing for this leave application first arose on 27 November 2014, the learned federal counsel representing the AG's Chambers had raised the objection with respect to the failure of the applicant to name the correct decision maker. The court then hearing the matter adjourned the hearing of the

leave application pending the applicant filing in an application for amendment. The applicant has duly filed via encl (10) the application to amend the statement pursuant to O 53 r 3(2) of the Rules of Court 2012 ('the ROC 2012'). The application seeks to amend the statement pursuant to O 53 r 3(2) by resorting to the provisions of O 20 r 5 of the ROC 2012 by replacing all the respondents named in the application for judicial review with the disciplinary board. There is however, no application before the court to extend the time to file such an application.

[13] The respondents not surprisingly are objecting to the application to amend. They rely on O 53 r 3(6) of the ROC 2012 which reads:

An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant.

[14] They submit that the applicant was first made aware of the decision to dismiss her on 12 June 2014 which meant that the application for leave to commence judicial review should have been filed on or before 12 September 2014. The application for leave was filed on 12 September 2014 and therefore was within the timeframe allowed by O 53 r 3(6) of the ROC 2012. However, the applicant's application to amend by substituting and adding a fresh party was filed on 17 December 2014 which is well after the time frame allowed under O 53 r 3(6) of the ROC 2012. The respondents submitted that to allow the application to amend would result in depriving a party, in this case, the disciplinary board, from raising a valid defence which is that limitation had set in. In doing so they rely upon the case of *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409 and in particular upon the following passage:

An application to add or substitute a new party to an action after the expiry of the limitation period should not be allowed on good and sound principles.

Lord Keith of Kinkel in *Ketteman v Hansel Properties* [1987] 2 WLR 312 referred to an old rule of practice at p 320. His Lordship said:

It has long been a rule of practice that amendment should not be allowed for the joinder of an additional defendant in a situation where a relevant period of limitation has already expired in relation to the cause of action against him. The reason for that rule of practice is, however, debatable. One theory is that an additional defendant, joined unconditionally, becomes a party to the action as from the date of issue of the writ against the original defendant, that is to say, that joinder is related back to that date. That being so, it would be unjust to join him as a defendant at a time when limitation has run in his favour, because to do so would have the effect of depriving him of a valid defence.

[15] From a perusal of the case, it would appear that pursuant to the observations of Lord Keith in *Ketteman's* case there were in fact two theories that operated when considering whether to allow an amendment in a situation

- A where limitation had set in. One was the ‘relation back theory’ as evident from the above quoted passage and the other was the ‘no useful purpose theory’, because no useful purpose would be served by joining an additional defendant when the limitation had already run in his favour because he was not to be deemed to have become a party at an earlier date when the actual date of joinder and therefore would have an unanswerable defence to the plaintiff’s claim. The House of Lords in *Ketteman’s* case eventually took the view that the true basis of the old rule of practice is the second theory that is the ‘no useful purpose’ theory.
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- C [16] The *Credit Corporation (M) Bhd’s* case however, involved an action for tort involving a motor vehicle accident where a decision to allow a party to be added after four years was overturned on appeal. It did not concern an application for judicial review.
- D [17] In applications for judicial review however, there are separate provisions relating to time limits fixed by O 53 r 3(6) of the ROC 2012. Further, drawing from the principles pronounced in the Federal Court case of *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2009] 6 MLJ 307; [2009] 6 CLJ 405, the provisions of O 15 r 6(2)(b) of the then Rules of the High Court 1980 relating to applications to intervene were held inapplicable as there were specific provisions for parties who wished to be heard in opposition pursuant to the provisions of O 53 r 8(1) of the Rules of the High Court 1980. The Federal Court applied the maxim ‘*generalia specialibus non derogant*’ in holding so.
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- F Therefore by way of analogy, where specific provisions have been enacted with respect to time limits under O 53 r 3(6) as in this case, the provisions of O 20 r 5 have no application. In the case of *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145, referred to by the respondents, the Federal Court in considering the purpose, inter alia, of
- G O 53 r 3(6) Rules of the High Court 1980 held as follows:
- One may ask what the purpose of these conditions is. The basic objective is to protect those entrusted with the enforcement of public duties ‘against groundless, unmeritorious or tardy harassment that were accorded to statutory tribunals or decision making public authorities by O 53, and which might have resulted in the summary, and would in any event have resulted in the speedy disposition of the application, is among the matters fit to be taken into consideration by the judge in deciding whether to exercise his discretion by refusing to grant a declaration ...’ as described in the celebrated case of *O’Reilly v Mackman* [1982] 3 All ER 1124 at p 1133. Further, there is also the need to reduce the delay in resolving such application in the interest of good administration. As Lord Diplock in *O’Reilly v Mackman* reiterated, ‘The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision’.
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[18] From a perusal of the principles enunciated in the above case, it can be seen at once that the main reason for such compliance is so that public authorities should not be held in suspense as to the legal validity of its decision for a period longer than is necessary. Such a rationale is in accord with sound public policy and good governance for if a public authority can be held in limbo as to whether its decision is susceptible to challenge indefinitely, it would result in unnecessary hesitancy in making decisions for fear that the decision could be impugned at any time.

[19] Compliance with time is therefore imperative under O 53. In the case of *SDB Damansara Sdn Bhd v Datuk Bandar Kuala Lumpur (No 1)* [2011] 9 MLJ 666, it was held:

Compliance with time is imperative under O 53. It also go to the very root of the issue, that is, the power of this court to hear an application for judicial review (see *Yahya bin Kasim v Government of Malaysia & Anor* [1997] 3 MLJ 749 and *Abdul Rahman Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur & Anor* [2008] 6 MLJ 704; [2008] 6 CLJ 805. The requirement for time compliance under O 53 r 3(6) was again emphasised in the Court of Appeal decision soaking through words of Zaleha Zahari JCA, in *Menteri Besar Negara Pahang v Seruan Gemilang Sdn Bhd* [2010] 4 MLJ 360; [2010] 5 CLJ 123. In that case, it was held that compliance with time requirement prescribed by rule is fundamental as it goes to the jurisdiction of the court, citing the Federal Court case of *Mersing Omnibus Co Sdn Bhd*.

[20] In *Mohd Ismail bin Abd Ghani (would like to be known in the identity card as Saravanan all Balakrishnan) v Ketua Pengarah Pendaftaran Negara & Anor* [2012] 1 MLJ 707, it was held:

In respect of an application for judicial review, compliance with the time frame was fundamental. It goes to the starting point, that of jurisdiction to hear the application. Order 1A of the RHC cannot be relied on to supersede O 53 r 3(6) which is a rule mandatory in nature.

[21] In *Menteri Besar Negeri Pahang Darul Makmur v Seruan Gemilang Makmur Sdn Bhd* [2010] 4 MLJ 360, it was held:

The High Court in its judgment was of the view that the 40 days specified under O 53 r 3(6) was not rigid. I am of the view the judge erred in ruling that the time frame prescribed by the rules is not rigid. I am in agreement with the appellant's counsel that compliance with the time frame prescribed by the rules is fundamental as it goes to jurisdiction (see *Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor* [1983] 2 MLJ 54).

[22] It is therefore clear that the three months time frame imposed by O 53 r 3(6) of the ROC 2012 for bringing an application for leave to file judicial review cannot be treated as mere pedantry or surplus of wording. It goes to the

- A jurisdiction of the court itself. Notwithstanding the above, the court has the general power to extend or abridge the time limit under O 53 r 3(6) if there are good reasons to do so (see O 53 r 3(7)). However, there must be good and satisfactory grounds laid before the court before it can exercise its discretion. Unfortunately here, there was in fact no application made for the court to exercise its discretion to extend or abridge the time. The affidavit (encl 10), filed in support of the applicant's application to amend (encl 9), did not allude to any reasons or any cogent reasons to explain the delay in filing the application. In *Mohd Ismail bin Abd Ghani (would like to be known in the identity card as Saravanan a/l Balakrishnan) v Ketua Pengarah Pendaftaran Negara & Anor*, it was held that the applicant's explanation did not satisfactorily account for the delay. It was also observed that it is immaterial whether the delay does not occasion any prejudice to the respondent or a third party. The submission of no prejudice caused was therefore not a satisfactory explanation for delay in filing for judicial review. In any event, as I said, there was no application to extend time to file the application to amend before the court.

- [23] Allowing the applicant to add a party at a stage when limitation had expired would also be prejudicial to the decision making body which in this case is the disciplinary board as it would have the effect of depriving it from relying on a defence that it would otherwise have been entitled to.

- [24] I have earlier given my reasons for allowing the objection raised by the learned FC that the application for judicial review filed by the applicant is flawed as none of the parties named as the respondents were in fact the decision making body.

- [25] Given the fact that the wrong parties have been cited, the application for leave must fail also on the grounds that it amounts to an application that is 'frivolous and vexatious'. In so holding I rely on the case cited by the respondent's of *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228, which held:

- The guiding principles ought to be that the applicants must show prima facie that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application. On the evidence in this case the appellants had prima facie an arguable case for the grant of the relief they sought.

- [26] Reference is also made to the case cited of *Boey Oi Leng (t/a Indah Reka Construction & Trading) v Trans Resources Corp Sdn Bhd* [2001] MLJU 566; [2002] 1 CLJ 405 which held:

Also, a petition may be described as frivolous where it is obviously unsustainable, eg, where the petition is res judicata, or *where the wrong party is being sued*, or without merit and unjustified. (Emphasis added.)

[27] In the final analysis, the fact that the proper party which is the disciplinary board has not been made a party within the time allowed by the provisions of O 53 r 3(6) of the ROC 2012 and the dismissal of the application to amend to include the proper party results in this court not being seized with jurisdiction to hear the leave application for judicial review.

[28] For the reasons given, the application for leave to file judicial review, encl (1) and the application to amend the statement under O 53 r 3(2) of the Rules of Court 2012, encl (10), are hereby dismissed with costs.

Applications dismissed with costs.

Reported by Afq Mohamad Noor

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